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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

LAVEDA NOONAN,
Petitioner,

v.

NEW YORK LIFE INSURANCE CO.,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit entered upon September 24, 1954 and confirmed upon rehearing October 26, 1954, reversing the decree of the District Court of the United States for the District of Oregon rendered upon May 22, 1953.

OPINIONS BELOW

The District Court did not deliver a formal opinion. For the convenience of this Court the trial court's Memorandum of Decision is set out in the appendix to this petition (Appendix A).

The opinion of the Court of Appeals is reported at 215 F. (2d) 905. This decision is also appended hereto (Appendix B).

BASIS OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed, as stated, upon September 24, 1954; petition for rehearing was duly filed upon October 20; and an order denying the petition for rehearing was entered upon October 26.

Application for stay of mandate pending application in this Court for writ of certiorari was made October 26, 1954, and an order staying the mandate until November 30 pending the application for writ of certiorari in this Court was entered October 26. Application for extension of stay of mandate pending application in this Court for writ of certiorari was made November 19, and an order extending the stay of mandate until December 15, was entered November 19, 1954.

Jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

QUESTION PRESENTED FOR REVIEW

The question presented here for determination is important but may be stated very briefly. It is as follows:

1. The insured complied with all the requirements of the life insurance application. These requirements were payment of the first premium in cash and submission to the company, on its own form, of satisfactory evidence of insurability. The company unqualifiedly agreed in this insurance contract application that, upon the completion of the application requirements, the policy, as applied for, would be in effect from the date set out in the body of the application as if the policy had been delivered. The effective date, with the parties' agreement, was backdated to save insurance age. No qualifying language was placed in the application concerning suicide. The insured committed suicide. *Quaere,* what effect, if any, is to be given the unqualified agreement of the parties in the application in regard to the inception of the company's liability?

STATEMENT OF THE CASE

Liability Under the Policy

On May 23, 1952, as a result of business adversities, financial difficulties and the mental strain brought on by overwork and worry, Harold Noonan committed suicide in his parked car among the west hills of Portland, Oregon, by firing a shotgun into himself. He left his wife

LaVeda Noonan, the petitioner herein, and his infant child the financial disaster which was his business and several small insurance policies among which was the policy under consideration, New York Life Insurance Policy 22-054-505 issued for $5000 (R. 48).

As beneficiary under this policy, LaVeda Noonan submitted to the New York Life Insurance Company on July 15, 1952 a claimant's statement and a certified copy of the death certificate. On July 18, 1952, the company rejected the beneficiary's claim and tendered her $266.38, which amount was the three semi-annual premiums insured had paid on the policy plus interest, claiming that the company's contractual liability was thereby discharged by virtue of the terms of the one-year suicide clause in the policy.

Jurisdiction of Court of First Instance

Thereafter LaVeda Noonan, a citizen of the State of Oregon, commenced this suit for the face amount of the policy in the United States District Court for the District of Oregon against the New York Life Insurance Company, a corporation organized and existing under the laws of the State of New York and a citizen of that state.

Jurisdiction of the District Court existed by virtue of the amount in controversy, $5,000, and the diverse citizenship (Section 1332 of Title 28 United States Code).

Contract Provisions

The insured made application for his policy on June 15, 1951 (R. 53), and the application contained, among other things, the following items. Item 18 of the application sets out in bold print "Write policy to take effect" and the (c) portion of that statement reads "as of 3-14-51." Item 25 of the application contains a record that the first semi-annual premium in the amount of $75.15 was paid in cash. The language beginning at the lower left hand corner of the application reads as follows:

> "IT IS MUTUALLY AGREED THAT:
>
> 1. If the applicant shall have paid the soliciting agent in cash, . . . an amount which equals the full first premium for the policy applied for, and if the company shall receive evidence satisfactory to it that at the time of completion of this application the Proposed Insured . . . was an acceptable risk for said policy at the Company's published premium rate therefor, the policy as applied for shall be deemed to be in effect as from the date specified in item 18 above as if it had been delivered."

As required of the insured by this clause, the necessary premium was paid and satisfactory evidence of insurability on appellant's own form (R. 54) was provided.

Item 3 of this portion of the application reads as follows:

> "3. The Applicant's acceptance of any policy issued on this application shall constitute ratification of all representations and agreements made in writing as part of this application and of any amendments and corrections which the Company makes and refers to under item 27 above in connection with issuance of the policy."

There were no items of change or correction, and there were no amendments to the application.

Among the provisions of the life insurance policy were the following (R. 52):

> "In event of suicide within one year from the date of issue of this Policy, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums hereon which have been paid to and received by the Company and no more."

> "This policy and the application therefor, copy of which is attached hereto and made a part hereof, constitute the entire contract."

The first page of this policy contains a reference to the March 14th day set out in the application (R. 48):

> "The anniversaries and insurance years of this Policy shall be determined from March 14, 1951, the date as of which this Policy shall be deemed to have taken effect."

The date of June 22, 1951, is also noted on the first page of the policy and it is set out as follows:

> "In Witness Whereof the NEW YORK LIFE INSURANCE COMPANY has caused this Policy to be executed on June 22, 1951, which is its date of issue."

Lower Court's Decisions

The trial court on May 22, 1953, in its memorandum decision held as a matter of law that there was an ambiguity between the terms of the application and the policy and found for the beneficiary (Appendix A).

The Circuit Court of Appeals reversed the District Court, basing their decision on language found in the policy issued to the insured (Appendix B).

ARGUMENT

Case on the Merits

Insured and the company unequivocally agreed on the effective date of the policy in the application signed by the insured and the company's representative. Webster's New International Dictionary, Second Edition Unabridged at page 818 gives this definition for *effect*: "state or fact of being operative". All qualifications placed in the application concerning any portion of this agreement were complied with by the insured.

An examination of the cases involving suicide situations reveals, in a substantial number of these cases, that it now is company practice to set out the restrictions as to suicide and incontestability in the application. It was within the company's power here to reconcile any conflict in the insurance contract by pointing out in its application its suicide or incontestable restrictions.

To what then, if anything, was insured entitled at the time he completed the application, insurance examination, paid his premium and received his binding receipt? Or was he solely at the mercy of the insurance company and what they might place in their policy? If they could without insured's consent qualify the agreement in the application as to the policy's date, could they not then in the policy qualify without insured's consent the amount

of the policy or to whom the policy proceeds would be paid?

It would seem that the Circuit Court of Appeals for the Ninth Circuit should have either given effect to the agreement of the insured and the company in the application and thereby have found that the suicide period had run or should have affirmed the lower court's opinion and found that there was an ambiguity between the terms of the application as agreed upon and the terms of the policy as issued.

As stated by Judge Gardner, specially concurring in the case of Pennsylvania Mutual Life Ins. Company v. Forcier, 103 F. (2d) 166, that where there is an inconsistency in the provisions of an insurance contract, effect should be given to the provision which creates liability.

Reasons for Allowance of the Writ

1. By finding for the life insurance company on these facts the Circuit Court of Appeals for the Ninth Circuit set up a conflict between its decision and the decision of other circuit courts of appeals as to the effect of the agreement between the parties in the contract application on the inception of the company's liability.

In the case of Prudential Insurance Company of America v. King decided by the Circuit Court of Appeals, Eighth Circuit, 101 F. (2d) 990, the application provided that, if the first full premium was paid with the application and provided the application was ap-

proved by the company, the insurance would be effective from the date of the application. The Eighth Circuit found the governing date to be the date both parts of the application was completed and placed the insurance in effect from that date regardless of a different date set out in the policy.

In the case of Pacific Mutual Life Insurance Company of California v. Barton decided by the Circuit Court of Appeals, Fifth Circuit, 50 F. (2d) 362, the application provided that if the first full premium was paid and the company was satisfied as to the applicant's insurability as of the date of the medical examination that the insurance would be effective from the date of the medical examination. The insured died before the insurance policy was received by him but after he had paid the first premium and submitted suitable evidence of insurability. The court found for the beneficiary giving effect to the agreement in the application.

2. By finding for the life insurance company on these facts the Circuit Court of Appeals for the Ninth Circuit set up a conflict between its own decisions as to the effect of the agreement between the parties in the contract application on the inception of the company's liability.

In Schwartz v. Northern Life Insurance Company, 25 F. (2d) 555, the insured in that case committed suicide and the policy incorporated a one year suicide clause. Both the application and the binding receipt in the Schwartz case provided that the insurance would be in force when the full premium was paid in advance in

cash and an examination satisfactory to the company had been made by the medical examiner. Both of these requirements were completed by the insured on August 2, 1924. The ninth circuit gave effect to the agreement in the application saying at p. 558:

> "From a consideration of all the provisions of the contract here in question, we reach the conclusion that the minds of the contracting parties met in fixing August 2, 1924 as the date from which the policy became effective and as the date upon which the risk commenced and the date from which began the year during which the policy might be contestable for suicide."

3. The decision of the Circuit Court of Appeals for the Ninth Circuit is believed to be erroneous and the conflicting decision of the trial court correct. Your petitioner feels that the decision of the ninth circuit under consideration probably conflicts with the decision of this Court in the case of Mutual Life Insurance Company of New York v. Hurni Packing Company, 263 U.S. 167, 44 S. Ct. 90, 68 L. Ed. 235, 31 A.L.R. 102. In that case this Court held that it was competent for the parties to agree that the effective date of he policy should be one prior to its actual execution and that that was what they did. A special provision of the application provided that the applicant by request might have the policy antedated for a period not to exceed six months. This provided for his insurance at the age of forty-seven. Under this agreement the policy was issued as of August 23 and the insurance became effective from its date of issue,

although it was not actually applied for until September 2 and not executed and delivered until September 7. This Court held, in effect, that although not delivered until a later date, the policy went into effect on the date agreed to by the parties as the effective date and not upon the later date upon which it was actually delivered.

The following language is found at 29 Am. Jur., Insurance, § 219:

> "As a general rule, the risk under a policy or contract of insurance attaches as of the time actually agreed upon or understood by the parties. It is competent for the parties to an insurance policy to agree that it shall be antedated, and thereupon it takes effect by relation from the agreed date. Whether the risk begins from a past day depends upon the terms of the contract, and such a provision will be given effect in the absence of anything showing a contrary intention or understanding."

The last sentence is footnoted with the Hurni Packing Company case.

4. Clearly the question presented is of public importance. As of mid year 1953, there were 793 life insurance companies in existence.[1] As of December 31, 1953, the New York Life Insurance Company alone had insurance in force totaling $12,416,338,464.[2]

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[1] Life Insurance Fact Book; 1954 Edition, p. 44; published by the Institute of Life Insurance.

[2] Best Life Insurance Reports; 1954 Edition; p. 818; published by Alfred M. Best Co.

A contract of life insurance is based on the application-policy system. Uniformity and certainty in matters of insurance contracts are necessary since expensive litigation destroys a large part of the possible benefits of the insurance regardless of who is finally successful. Settlement of this question by this Court is plainly in the public interest.

Respectfully submitted,

THOMAS H. RYAN

APPENDIX

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LAVEDA NOONAN, Plaintiff,	)	
vs.	)	Civil No. 6852
NEW YORK LIFE INSURANCE COMPANY, a corporation, Defendant.	)	MEMORANDUM OF DECISION

By conventional canon, the suicide clause of the policy must be read with the application.

The application reads:

> If the Applicant shall have paid the soliciting agent in cash, . . . , an amount which equals the full first premium . . . , and if the Company shall receive evidence satisfactory to it that at the time of completion of this application the Proposed Insured . . . was an acceptable risk for said policy . . . , the policy as applied for shall be deemed to be in effect as from the date specified in item 18 above (3-14-51) as if it had been delivered.
>
> (Date in parenthesis and underlining added)

Can it be denied that the quoted language conflicts with the language of the policy?[1] Construction being necessary, the construction most favorable to the bene-

[1]Suicide Clause:

"In event of suicide within one year from the date of issue of this policy, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums hereon which have been paid to and received by the Company and no more."

ficiary is to be adopted. It follows that judgment will be for plaintiff.

Dated May 5, 1953.

/s/ Claude McColloch
Judge

Defendant's authorities are distinguishable.

C. McC.

[Endorsed]: Filed May 5, 1953.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a Corporation,	)	
Appellant,	)	No. 13,960
vs.	)	
	)	Sep. 24, 1954
LAVEDA NOONAN,	)	
Appellee.	)	

Appeal from the United States District Court for the District of Oregon

BEFORE: HEALY, POPE, and CHAMBERS, Circuit Judges

HEALY, Circuit Judge

This is a suit on a policy of life insurance. The contract contained a clause barring recovery of the principal sum if death by suicide should occur within a year of the issuance of the policy. The insured became a suicide. The trial court, deeming the contract to be ambiguous as regards the date on which the year began to run, resolved the ambiguity in favor of the beneficiary (appellee here) and accordingly gave judgment for the latter. The sole question on the Company's appeal is whether an ambiguity exists in the respect mentioned.

The application for the insurance was executed by the insured on June 15, 1951. For the obvious purpose of giving the insured the benefit of a lower premium rate based on his insurance age, the application asked in item 18 thereof that the policy be written to take effect

March 14, 1951.[1] A further provision of the application reads: "It is mutually agreed that: If the Applicant shall have paid the soliciting agent in cash, . . ., an amount which equals the full first premium . . ., and if the Company shall receive evidence satisfactory to it that at the time of completion of this application the proposed Insured . . . was an acceptable risk for said policy . . ., the policy as applied for shall be deemed to be in effect as from the date specified in item 18 above as if it had been delivered."

In conformity with the application, the policy thereafter issued contained on its first page the following statement: "The anniversaries and insurance years of this Policy shall be determined from March 14, 1951, the date as of which this policy shall be deemed to take effect." Following this provision, and immediately preceding the signatures of the Company's authorized officers appears the clause: "In witness whereof the New York Life Insurance Company has caused this Policy to be executed on June 22, 1951, *which is its date of issue.*" [Emphasis ours.] The suicide provision in question reads: "In event of suicide within one year *from the date of issue of this Policy,* whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums hereon which shall have been paid to and received by the Company and no more." [Emphasis ours.] The incontestabiliity clause, so far as material, reads: "This Policy shall be incontestable after it has been in force during the lifetime of the Insured

[1] The application indicates that the insured became 52 years of age on September 15, 1950.

for one year from *its date of issue* . . . ." [Emphasis ours.]

The insured's death by suicide occurred May 23, 1952. Appellant thereafter tendered to the beneficiary the premiums paid, with interest. The tender was rejected, and the beneficiary brought this suit for recovery of the face amount of the policy. As already indicated, the court, believing the provisions of the policy and the application therefor to be conflicting or ambiguous as to the controlling date, granted judgment for the beneficiary.

We are not able to agree that conflict or ambiguity exists. The entire contract is set out in the policy and the application, which latter was expressly made a part of the contract. Clearly, the policy was in effect from March 14, 1951 for every purpose except the suicide and incontestability provisions. The latter are on their face governed by "the date of issue," which was specifically stated in the policy to be June 22, 1951. The two dates, March 14, 1951, and June 22, 1951, serve entirely different purposes, as is readily ascertainable from a reading of the instrument. The insured's suicide occurred within one year from the specified date of issue, hence applicant's obligation was limited to the return of premiums paid.

A number of authorities are cited by the parties, particularly by appellant, but their citation in this opinion would serve no useful purpose.

Reversed.

(Endorsed:) Opinion. Filed Sep. 24, 1954.

Paul P. O'Brien, Clerk.